

Rule 13 and Rule 23, Ariz. R. Crim. P.

Lesser-Included Offenses: In general.....Revised 11/2009

There are two categories of lesser-included offenses: "necessarily-included offenses," which are offenses that, by their very nature, are always a constituent part of the greater offense, and lesser offenses that are described by the charging document in a particular case even though they do not always make up a constituent part of the greater offense. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 12, 965 P.2d 94, 97 (App. 1998). In analyzing whether an offense is a lesser-included offense of another under the facts charged in a particular case, the court must analyze the statutory elements of the offenses.

In beginning this analysis, we first note the principle that for one offense to be included within another, greater offense, the greater must have all the elements of the lesser plus at least one additional element. ... It is this additional element that permits the greater to house the lesser and gives the greater its inclusive effect, and consequently its name.

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Another relevant principle we must consider is that a lesser-included offense must be composed solely of the elements of the greater. Thus, it is not enough to satisfy the test that the greater offense cannot be committed without necessarily committing the lesser. It must also be shown that the lesser cannot be committed without always satisfying the corresponding elements of the greater.

In re Victoria K., 198 Ariz. 527, 530-31, ¶ 15, ¶ 17, 11 P.3d 1066, 1069-70 (App. 2000) [citations omitted]. In other words, a lesser-included offense must be "one composed of fewer elements than the greater offense, not merely one having a lesser penalty." *State v. Woods*, 168 Ariz. 543, 545, 815 P.2d 912, 914 (App. 1991).

An indictment on a greater offense puts a defendant on notice of all necessarily-included offenses as soon as he is indicted. *State v. Blakley*, 204 Ariz. 429, 440, ¶ 51, 65 P.3d 77, 88 (2003); *State v. Hutton*, 143 Ariz. 386, 390, 694 P.2d 216, 220 (1985). Rule 23.3, Ariz. R. Crim. P., provides as follows:

Conviction of necessarily included offenses

Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense. The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury.

"A lesser-included offense can have the same or lesser penalty as the greater offense." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, 965 P.2d 94, 97 (App. 1998), citing *State v. Patton*, 136 Ariz. 243, 245, 665 P.2d 587, 589 (App. 1983). However, a lesser-included offense cannot have a greater penalty than the greater offense. In *State v. Siddle*, 202 Ariz. 512, 47 P.3d 1150 (App. 2002), the defendant was convicted of possession of a dangerous drug for sale and other drug offenses, and also of possession of a deadly weapon during the commission of a felony drug offense. On appeal, he argued that the substantive drug offenses were lesser-included offenses of possession of a deadly weapon during a drug felony. The Court of Appeals rejected that argument, noting that the drug offenses were greater offenses than the weapons offense "by reason of felony classification." *Id.* at 516, ¶ 11, 47 P.3d at 1154.

Both the State and the defense are entitled to instructions on any charged offense and any lesser-included offense for which there is evidentiary support. See *State v. Hurley*, 197 Ariz. 400, 403, ¶ 13, 4 P.3d 455, 458 (App. 2000), citing *State v. Govan*, 154 Ariz. 611, 615, 744 P.2d 712, 716 (App. 1987). That is to say, before a

lesser-included offense instruction may be given, the evidence presented must support a conviction for the lesser offense. "Lesser-included offense instructions must be given if requested and if supported by the evidence. ... An instruction on a lesser-included offense must be given if a jury could rationally find that the State failed to prove the distinguishing element of the greater offense." *State v. Tschilar*, 200 Ariz. 427, 436-37, ¶ 39, 27 P.3d 331, 340-41 (App. 2001) [citations omitted]. See also *State v. Krone*, 182 Ariz. 319, 323, 897 P.2d 621, 625 (1995) [same]. That is, the trial court should not give a lesser-included offense instruction unless the evidence presented at trial supports the instruction. As the Arizona Supreme Court held in *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984), when a defendant proffers an alibi defense, the record usually contains little if any evidence to support an instruction on any lesser-included offense. For example, in *State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996), the defendant was charged with first degree murder. He claimed that he was not responsible for the victim's death in any way. On appeal, he argued that the trial court should have instructed the jury on second degree murder as a lesser-included offense of first degree murder. The Arizona Supreme Court held that no lesser-included offense instruction was warranted because the record would not support a finding that the defendant killed the victim but lacked premeditation. *Id.* at 27, 918 P.2d at 1045.

Furthermore, the fact that a jury could disbelieve all the evidence of the greater charge in a given case except the elements of the lesser does not necessarily require an instruction on the lesser. That is, the trial court need not give instructions on "all offenses theoretically included in every charged offense," *State v. Bolton*, 182 Ariz. 290,

309, 896 P.2d 830, 849 (1995), but need only give instructions on lesser included offenses that are actually supported by the evidence presented at trial. *Id.*

The jury must be provided with verdict forms allowing the jury to find the defendant guilty or not guilty of the greatest charged offense and all lesser-included offenses. *State v. Knorr*, 186 Ariz. 300, 304, 921 P.2d 703, 707 (App. 1996). But the court need not provide the jury with specific "not guilty" forms for all lesser-included offenses; it is sufficient if there is a generic "not guilty" form so long as it gives the jury an opportunity to acquit the defendant on every offense. *See State v. Hernandez*, 191 Ariz. 553, 561, ¶ 38, 959 P.2d 810, 818 (App. 1998)

"When a jury returns guilty verdicts for both a charged offense and a lesser included offense, the preferable course of action is to 'explain the situation to the jury, reinstruct on the law, and allow the jury to deliberate further.'" *State v. Rich*, 184 Ariz. 179, 181, 907 P.2d 1382, 1384 (1995), *quoting State v. Engram*, 171 Ariz. 363, 366, 831 P.2d 362, 365 (App. 1991).

The State does not have to instruct a grand jury of lesser-included offenses; the State need only instruct the grand jury on the highest charge supported by the evidence. *State v. Coconino County Superior Court [Mauro, Real Party in Interest]*, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984).

A defendant does not forfeit his right to a lesser-included offense instruction by asserting an all-or-nothing defense if the evidence in the record is sufficient to support the instruction. *State v. Wall*, 212 Ariz. 1, 126 P.3d 148 (2006).